



Tasmanian Council of Social Service Inc.

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# Religious Discrimination Bill and Human Rights Legislation Amendment Bill

*December 2021*



**INTEGRITY  
COMPASSION  
INFLUENCE**

## About TasCOSS

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TasCOSS's vision is for one Tasmania, free of poverty and inequality where everyone has the same opportunity. Our mission is two-fold: to act as the peak body for the community services industry in Tasmania; and to challenge and change the systems, attitudes and behaviours that create poverty, inequality and exclusion.

Our membership includes individuals and organisations active in the provision of community services to Tasmanians on low incomes or living in vulnerable circumstances. TasCOSS represents the interests of our members and their service users to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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## Introduction

Thank you for the opportunity to make a submission in relation to the Religious Discrimination Bill 2021 ('the Bill') and the Human Rights Legislation Amendment Bill ('the Human Rights Bill'). Where our comments relate to both, we refer to 'the Bills'.

TasCOSS supports protections against discrimination on the basis of religious beliefs, practices or activities. In our view, however, the Bills go much further than legislating protection *from* discrimination on the basis of religion or religious belief, and instead introduce a right *to* discriminate in the name of religion. We are also very concerned that the Bills undermine existing state and territory anti-discrimination acts, in particular Tasmania's, which have helped foster greater inclusion and equality in this State and across Australia. We oppose the Bills because they reach beyond their professed intent and will sow social division and harm, particularly against individuals and population groups already subject to stigma and discrimination. Alarming, for those living in Tasmania the Bills will strip their right to take action when certain acts of discrimination occur.

To demonstrate why we believe the Bills in their current form are unnecessary and harmful, this submission will briefly outline the objectives and history of the Religious Discrimination Bill, and the current legislative framework, before examining the areas we are most concerned about, which include:

- Statements of belief
- Qualifying bodies and statements of belief
- Discrimination in conduct and employment of religious institutions
- Changes to the Marriage Act relating to hiring of commercial facilities.

## Objectives of the Religious Discrimination Bill

The purpose of the Bill is found in clause 3, which states:

*(1) Recognising the freedom of all people to have or adopt a religion or belief of their choice, and freedom to manifest this religion or belief either individually or in community with others, the objects of this Act are:*

*(a) to eliminate, so far as is possible, discrimination against persons on the ground of religious belief or activity in a range of areas of public life; and*

*(b) to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of religious belief or activity; and*

*(c) to promote the recognition and acceptance within the community of the principle that people of all religious beliefs, including people with no religious belief, have the same fundamental rights in relation to those beliefs; and*

*(d) to ensure that people can, consistently with Australia's obligations with respect to freedom of religion and freedom of expression, and subject to specified limits, make statements of belief.*

*(2) In giving effect to the objects of this Act, regard is to be had to:*

(a) *the indivisibility and universality of human rights, and their equal status in international law; and*

(b) *the principle that every person is free and equal in dignity and rights.*

As per the Explanatory Memorandum, the Bill provides comprehensive protections prohibiting discrimination on the basis of a person's religion in a number of public settings, with the intention of ensuring people of all religions and faiths are 'able to hold and manifest their faith, or lack thereof, in public without interference or intimidation'.<sup>1</sup> The Bill also seeks to 'promote attitudinal change, to ensure that people are judged on their capacity and ability, rather than on generally unfounded negative stereotypes that some may have about people who hold certain religious beliefs or undertake certain religious activities'.<sup>2</sup>

### History of the Bill

In 2017, following public discussion and debate surrounding the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), then-Prime Minister Malcolm Turnbull announced the appointment of an Expert Panel to examine the protection of freedom of religion in Australian law. The Expert Panel was comprised of experts in human rights and constitutional law,<sup>3</sup> who conducted a review of existing legislation and case law, as well as engaging in a wide range of public consultations. During the course of their investigation the Expert Panel received some 15,620 public submissions,<sup>4</sup> and held around 90 consultation meetings with 180 individuals and community groups.<sup>5</sup>

Despite the lack of a nationally legislated right to freedom of religion, the review highlighted that most Australians enjoy the freedom to engage in religious activities and practise their beliefs and/or faiths. In particular, the Expert Panel noted that, '[t]hose from faiths that face persecution overseas were particularly vocal in acknowledging the relative safety that Australia affords people of different faiths. These perspectives highlighted that religious freedom is precious and that it needs to be actively preserved. The question for Australia is how best to continue doing this in changing times.'<sup>6</sup>

The Expert Panel made a number of recommendations designed to strengthen and further protect religious freedoms in Australia, including proposed changes to anti-discrimination laws in jurisdictions where discrimination on the basis of a person's religious belief or activity is not currently unlawful,<sup>7</sup> and development of a public education program to promote greater awareness and understanding of human rights and religion in Australia.<sup>8</sup> It is important to note, however, the Expert Panel did not recommend a standalone Commonwealth Religious Freedom Act, and that the review contained the following observation:

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<sup>1</sup> Explanatory Memorandum, Religious Discrimination Bill 2021 (Cth) 2.

<sup>2</sup> Ibid, 3.

<sup>3</sup> Members of the panel were: the Hon Philip Ruddock (Chair), Professor Dr Nicholas Aroney, the Hon Dr Annabelle Bennett AO SC, Father Frank Brennan SJ AO, and Emeritus Professor Rosalind Croucher AM.

<sup>4</sup> Expert Panel, *Religious Freedom Review: Report of the Expert Panel* (May 2018) 16.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid, 10.

<sup>7</sup> The examples referred to in Recommendation 16 of the *Religious Freedom Review: Report of the Expert Panel* were NSW and SA.

<sup>8</sup> Expert Panel, *Religious Freedom Review: Report of the Expert Panel* (May 2018) 6.

*Specifically protecting freedom of religion would be out of step with the treatment of other rights. Moreover, the statutory expression of positive rights would need to be carefully crafted having regard to the need to reconcile them with the full suite of other human rights. As a matter of practicality, this necessitates a framework which provides equal treatment for a wide range of human rights.*

### **Australian Government's Response**

The Australian Government responded to the findings of the Expert Panel in December 2018,<sup>9</sup> indicating they would introduce federal legislation to protect against discrimination on the basis of religion. The Government noted the following:

*This Bill will ensure people's right to freedom of religion is adequately protected in our community by the establishment of legislation that adopts the same framework that exists in other Commonwealth anti-discrimination legislation. The Bill will provide substantive protection against discrimination by rendering it unlawful to discriminate on the basis of a person's religious belief or activity, including on the basis that a person does not hold a religious belief or participate in a religious activity; and will include a framework of appropriate exemptions as exists in other anti-discrimination legislation.*

The current Bill is the third iteration of this draft legislation, with a first exposure draft released in mid-2019 and a second exposure draft in late 2019.

### **Current Legal Framework**

There is no national legislated right to religion or freedom of religion in Australia and religion is not a protected attribute under Commonwealth anti-discrimination law. Protection against discrimination on the basis of religion is found in state and territory anti-discrimination legislation – for example, s16 of the *Anti-Discrimination Act 1998* (Tas), which prohibits discrimination on the basis of protected attributes, including religious belief. Some state and territory anti-discrimination laws also provide limited exceptions – for example, allowing religious bodies to make employment decisions which discriminate in relation to protected attributes, for example sex or sexual orientation (Tasmania's Act does not provide any exceptions to the prohibition of discrimination on the bases of sexual orientation, gender identity or intersex variations to sex characteristics).

The lack of consistency in protections offered by state and territory anti-discrimination law was raised as a concern by the Expert Panel, who recommended amendments to state legislation in NSW and SA to make it unlawful to discriminate on the basis of a person's religious belief.<sup>10</sup>

### **Key Concerns**

TasCOSS recognises the Government has taken steps to address some concerns raised by community members and organisations in relation to earlier drafts of the Bill. It is the view of TasCOSS and many of our members, however, that the Bills remain unacceptable due to their undermining or overriding of existing protections against discrimination – in particular, s17 of Tasmania's Act – and permitting

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<sup>9</sup> Australian Government, *Australian Government response to the Religious Freedom Review* (December 2018).

<sup>10</sup> Expert Panel, *Religious Freedom Review: Report of the Expert Panel* (May 2018) 5.



discriminatory statements and actions in the name of religion, thereby elevating religious belief over other human rights.

### **Statements of belief**

Statements of belief are defined in clause 5 as a statement which:

- (i) *is of a religious belief held by a person; and*
- (ii) *is made, in good faith, by written or spoken words or other communication (other than physical contact), by the person; and*
- (iii) *is of a belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.*<sup>11</sup>

The definition also includes statements made by a person who doesn't practice a particular religion or hold a particular belief, including statements which:

- (i) *is of a belief held by a person who does not hold a religious belief; and*
- (ii) *is made, in good faith, by written or spoken words or other communication (other than physical contact), by the person; and*
- (iii) *is of a belief that the person genuinely considers to relate to the fact of not holding a religious belief.*<sup>12</sup>

Clause 12 of the Bill makes it clear that statements of belief do not, in and of themselves, constitute discrimination for the purposes of Commonwealth, state or territory discrimination legislation. This includes federal legislation such as the *Disability Discrimination Act 1992* (Cth), as well as state anti-discrimination legislation. Notably, clause 12(1)(b) specifically addresses the Tasmanian legislation and provides that a statement of belief does not contravene s17(1) of the *Anti-Discrimination Act*.

There are exemptions in clause 12(2) for statements which are malicious, or which a reasonable person would consider to threaten, harass or vilify a person or group, or which could be seen to be counselling or promoting a serious offence.

As per the Explanatory Memorandum, *'[t]he intent of the clause is to ensure that genuine and sincerely held religious views and non-religious views may be freely expressed without legal repercussion in relation to the statement in and of itself, provided they are expressed in good faith and are not malicious'*.<sup>13</sup> The clause protects the right to freedom of expression by allowing a person to express a belief they hold 'in good faith', and to provide a defence to a complaint of discrimination made in relation to such statements.

The inclusion of this provision goes beyond the mere protection of the right to peacefully and lawfully practise one's religion or faith, and instead creates a positive right to make statements or engage in communications in accordance with one's faith, religion or belief. This means that certain statements or communications which would currently constitute unlawful discrimination (for example, on the basis of

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<sup>11</sup> Religious Discrimination Bill 2021 (Cth) cl 5 (a).

<sup>12</sup> Religious Discrimination Bill 2021 (Cth) cl 5 (b).

<sup>13</sup> Explanatory Memorandum, Religious Discrimination Bill 2021 (Cth) 53.

sex, race or disability) would be protected, as long as the statements relate to a religious belief held by the person, are made in good faith, and the person believes are in accordance with their personal subjective interpretation of their religion, even if it differs from the views of any religious organisation of the same denomination. This entirely subjective test is so broad that it would, for example, allow a White supremacist to make racist comments and claim they are based on their own interpretation of Christianity. The Bill also offers protections to individuals and community members in relation to their religion and religious belief that are far greater than the protections offered on the basis of any other protected attribute in Australian law.

TasCOSS supports protections against discrimination on the basis of religion but we strongly disagree that individuals, groups or associations should be allowed to, without consequence, freely express views which humiliate, insult, ridicule, or intimidate. Although there is an exception for statements which are malicious or that could constitute vilification, we do not believe this offers sufficient protection against public discourse which creates division and undermines a culture of equality and respect of diversity. Examples of statements which would be permitted include:

- A manager could tell a staff member with disability that their disability is the result of sin
- A business owner could tell his Indigenous employee that Indigenous culture is Satanic
- A principal could tell a female teacher that the role of women is to submit to their husbands, stay home and have babies.

These examples are particularly relevant in Tasmania where, under s17 of this State's *Anti-Discrimination Act*, in 2020-21 approximately one third of complaints were from people with disability. A further third of complaints under this section were on the basis of race, age, or gender.<sup>14</sup> The conduct to which this section applies is that which have 'profound and serious effects and not to be likened to mere slights'.<sup>15</sup> In overriding this section, the Bill would remove an important protection marginalised Tasmanians have had for many years against these 'profound and serious effects'. This protection has helped to foster inclusion, equality and social cohesion in Tasmania, including through mediation processes from complaints taken under the Act. Positive outcomes have been achieved in a wide variety of cases, from children of colour being bullied in the school yard to people with disabilities being demeaned at work.<sup>16</sup>

### **Qualifying bodies and statements of belief**

Clause 15 deals with statements of belief in the context of qualifying bodies (for example, a body regulating a group of professionals or members of a trade). This clause prevents a qualifying body from imposing or proposing to impose a condition which could restrict or prevent a person from making a statement of belief in their personal capacity, unless compliance with such a rule would be an essential part of their profession.<sup>17</sup>

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<sup>14</sup> As per Equal Opportunity Tasmania, *Annual Report 2020-2021* (30 September 2021) 10.

<sup>15</sup> *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48

<sup>16</sup> See for example case studies in [Equal Opportunity Tasmania](https://www.equalopportunitytasmania.org.au/)

<sup>17</sup> (1) *A qualifying body discriminates against a person on the ground of the person's religious belief or activity if:*

The intent of these provisions is to recognise ‘individuals, including, for example, teachers, lawyers, health professionals and tradespeople, should not be at risk of losing their registration or qualifications by reason of the expression of their religious beliefs in their personal capacity’.<sup>18</sup> However, TasCOSS is of the view that this provision, along with the general clauses relating to ‘statements of belief’ as outlined above, could provide protection for people who express insulting or harmful comments under the guise of expressions of religious beliefs. For example, a teacher who tells a child with disability that their disability is a test of their character from God. The status of some professionals in relation to the often vulnerable circumstances of their patients, students or service users increases the likelihood of harm from such statements.

TasCOSS strongly opposes this clause because we believe qualifying bodies have the duty to ensure their members provide non-discriminatory and inclusive services. We also believe those bodies should have the right to investigate incidents involving their members, and to take appropriate disciplinary action where necessary.

### **Discrimination in conduct and employment of religious institutions**

The Bill contains several clauses designed to give various institutions (such as educational institutions, accommodation providers or disability service providers) the right to engage in certain conduct or make employment-related decisions on the basis of religious belief. For example, clause 9(3) provides that religious hospitals, religious aged care facilities, religious accommodation providers and religious disability service providers can engage in ‘certain conduct’ in relation to employment and partnerships, in good faith, as long as the conduct could be considered to be in accordance with the doctrines/teachings of their religion and is consistent with a publicly available policy. Alarming, TasCOSS notes that the conduct only needs to be reasonably considered in accordance with the doctrines or teachings of their religion by one other person, and does not have to be in accordance with the views of any church or other religious body. This makes the test for this conduct far more lenient than any other religious exception in any Commonwealth, state, or territory anti-discrimination law.

A similarly lenient exception relating to religious educational institutions is clause 11, which, in overriding certain state and territory anti-discrimination laws, states that it is not unlawful for such institutions to preference, in good faith, the employment of people who hold particular religious beliefs, as long as this conduct is consistent with a written policy.<sup>19</sup>

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*(a) the qualifying body imposes, or proposes to impose, a condition, requirement or practice (a qualifying body conduct rule) on persons seeking or holding an authorisation or qualification from the qualifying body that relates to standards of behaviour of those persons; and*

*(b) the qualifying body conduct rule has, or is likely to have, the effect of restricting or preventing the person from making a statement of belief other than in the course of the person practising in the relevant profession, carrying on the relevant trade or engaging in the relevant occupation.*

*(2) However, a qualifying body does not discriminate against a person under subsection (1) if compliance with the qualifying body conduct rule by the person is an essential requirement of the profession, trade or occupation.*

*(3) Subsection (1) does not apply to a statement of belief:*

*(a) that is malicious; or*

*(b) that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group; or 30 (c) that is covered by paragraph 35(1)(b).*

<sup>18</sup> Explanatory Memorandum, Religious Discrimination Bill 2021 (Cth) 63.

<sup>19</sup> (1) A religious body that is an educational institution does not contravene a prescribed State or Territory law if:



TasCOSS notes that exceptions exist in state and territory anti-discrimination law allowing for institutions to preference the hiring of staff based on their religious beliefs and practices – for example, s51 of the *Anti-Discrimination Act 1998* (Tas):

- (1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment if the participation of the person in the teaching, observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.*
- (2) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.*

The Bill goes further than these exceptions, however, and arguably permits discrimination against people who hold the organisation's faith but who may nevertheless be deemed by the organisation not to be living according to that faith. For example, TasCOSS has learned of a Catholic teacher who was appointed to a Catholic school only for the Archbishop to intervene and retract the offer because the man was in a de facto relationship.

Of grave concern to TasCOSS is that the Bill overrides the Tasmanian Act which has, for nearly 25 years, offered protections for LGBTIQ+ teachers and other staff in Tasmanian schools and in a diverse range of service organisations. During that time hundreds of Tasmanians have felt safe to be their true selves at work. The Bill throws a shadow over the security of their employment should the Bill become law, because those staff could now be deemed to be living in ways at odds with that organisation's faith and therefore subject to termination. TasCOSS is aware of individuals already seeking advice about their employment status.

### **Changes to the Marriage Act**

The Human Rights Bill proposes to amend section 47(c) of the *Marriage Act 1961* (Cth) to allow religious educational institutions to refuse to hire facilities or provide goods and services (that they otherwise hire out for marriage-related activities) in relation to the solemnisation of a marriage that they purport is against the tenets of their religious belief. This proposal is clearly aimed at LGBTIQ+ couples marrying and will override existing protections in the Tasmanian *Anti-Discrimination Act*. But it could also affect

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- (a) when engaging in conduct described in section 19 (about employment), the religious body gives preference, in good faith, to persons who hold or engage in a particular religious belief or activity; and*
- (b) the conduct is in accordance with a written policy that:*
- (i) outlines the religious body's position in relation to particular religious beliefs or activities; and*
  - (ii) explains how the position in subparagraph (i) is or will be enforced by the religious body; and*
  - (iii) is publicly available, including at the time employment opportunities with the religious body become available.*

others, such as divorced people seeking to remarry. Some institutions captured under this proposal receive public money. TasCOSS strongly opposes discrimination in all its forms, not least by taxpayer-funded institutions, and therefore strongly objects to the proposed amendment.

## Conclusion

TasCOSS strongly opposes both the Bill and the proposed changes to the *Marriage Act* and urges the Committee to reject them. Regarding the Religious Discrimination Bill, we do not believe any amendments could produce an acceptable piece of legislation and urge the Committee to recommend the Government draft a conventional discrimination bill that simply adds the prohibition of discrimination on the grounds of religious affiliation, belief and practice, to an existing federal discrimination law, without allowing discrimination in the name of religion.

We also wish to lodge our objection to the unreasonably short time frame in which to make a submission on a complex piece of legislation that has far-reaching consequences for all Australians. Such time frames do not suggest a genuine interest in exploring these consequences. We also wish to object to the wording of the survey, which appears designed to only elicit responses in support of the legislative package. This too is not consistent with a genuine and objective interest in canvassing the views of the Australian public.

Further, if passed, the Bill will have a profound impact on the legislative and social landscape in Tasmania with respect to protection from discrimination. We therefore request the Committee hear directly from a panel of Tasmanian civic organisations, including TasCOSS, when hearings commence.